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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 158

AMOS SHRIVER, *Appellant,*

vs.

WOODBINE SAVINGS BANK OF WOODBINE, IOWA,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

REPLY BRIEF FOR APPELLANT, AMOS SHRIVER.

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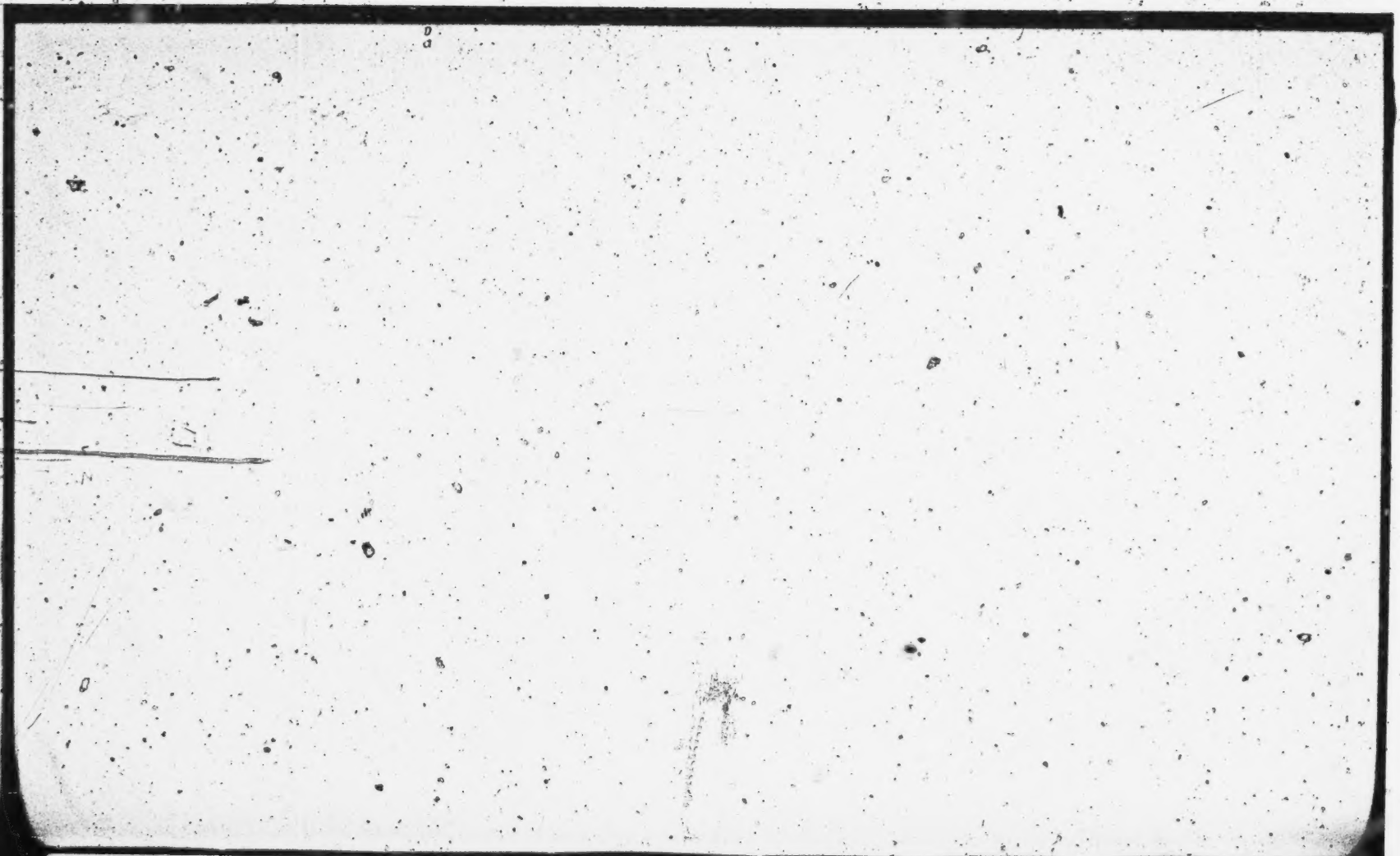

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WOODBINE SAVINGS BANK OF WOODBINE, IOWA, *Appellee.*

REPLY BRIEF AND ARGUMENT FOR APPELLANT, AMOS SHRIVER.

ARGUMENT.

Appellant desires to briefly reply to Appellee's Argument herein.

Division One.

Appellee in Division one of its argument contends that the enactment of the 25th General Assembly of Iowa (25 G. A. Ch. 29) imposed a personal liability upon appellant as a stockholder in appellee bank to pay an assessment to restore impaired capital. The enactment of the 25th General Assembly of Iowa together with the several codifications of that act are set forth in appendix to Appellant's Brief pages 28 to 34.

The title of the original act (25th G. A. Ch. 29) was as fol-

lows: "An act to provide for the better security of depositors in State and Savings Banks under the laws of Iowa." Because of this title appellee contends that a personal liability was intended to be imposed upon the stockholders in order that the purpose of the Act be carried out. In this contention appellee is in error.

There is no doubt that the act of the 25th General Assembly was intended to provide a method of strengthening banks whose capital stock should become impaired and in so doing render depositors in such banks more secure. However, the General Assembly as a part of its act provided and limited the method of accomplishing the desired result. It was never contemplated that a bank whose capital stock was impaired 100% should be kept in operation by assessments under this statute.

At the time of and prior to the enactment of the 25th General Assembly (25 G. A. ch. 29) there existed a statute of Iowa that made it mandatory for the auditor of state to cause to be liquidated any bank he deemed insolvent. The same duty under more recent enactments and codifications is now cast upon the superintendent of banking. Section 1572 Code of Iowa, 1873; Sec. 1877 Code of Iowa, 1897; Section 9238 Code of Iowa, 1924. Appendix page 8.

It was contemplated and intended by the enactment of the 25th General Assembly of Iowa (25 G. A. ch. 29) that a sale of the stock of stockholders, who did not care to contribute further to the enterprise by paying the assessment to make good impaired capital, should cause the deficiency in the capital stock to be made good. For instance, if the capital stock of a bank were impaired 10% or 25% a sale of the stock of any shareholder who refused to pay a pro rata of an assessment would certainly make up the deficiency in the stock. It was the intention of the General Assembly that the stock be sold for sufficient to make good the deficiency in the capital stock and it so declared. It was intended that

the stock be sold only when it would realize a sufficient amount to make the capital of the bank whole. In other words it was intended that the party who purchased the stock should in his purchase pay the deficiency in the capital stock of the bank or the proportion thereof represented by the stock sold. The purchaser by his purchase price payment received the stock and his payment was for his benefit and operated to make the capital of the bank whole.

The statute (25th G. A. Ch. 29) did not contemplate or authorize a sale of the stock for less than sufficient to satisfy the assessment. In fact this statute required that the sale of the stock make good the impairment. This is true because of the language of the statute and because a sale of the stock alone was provided for.

The enactment of the 25th General Assembly provided in part as follows:

> "* * * it shall be the duty of the board of directors to cause a sufficient amount of the capital stock held by such shareholder or shareholders to be sold at public auction * * * to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders."

This enactment in its original form and as codified provided that a sufficient amount of capital stock be sold to *satisfy the deficiency.* The word "deficiency" refers to deficiency in the capital stock of the bank. The term is so used in Section One of the Act.

The act of the 25th General Assembly in its original form and as codified is found in appendix to Appellant's Brief, pages 28 to 34.

The act did contemplate that the sale of the stock might bring more than sufficient *"to make good the deficiency"* and provided that in such case the balance should be returned to the shareholder. No provision was made for taking care of

the deficiency in the capital stock in case a sale of the shares did not "*make good the deficiency*" because it was never intended or contemplated that there should be a sale for less than a sum sufficient "*to make good the deficiency*" and no such sale was authorized.

It was never intended that the shares of a stockholder be sold for a sum not sufficient "to make good the deficiency", the stockholder's relationship to the corporation terminated, and that he (original stockholder) should remain duty bound or liable to contribute a further sum which could operate only for the benefit of another. No such drastic result was ever contemplated or the legislature would have used plain and definite language to that effect.

Had the legislature intended to render a stockholder personally liable it would have said so. The legislature was not unmindful of the meaning of the phrase "individually liable" because it used the phrase in section 3 of the very act when providing liability of bank directors who refused to make the assessment. Neither was the legislature unmindful that a personal liability is enforceable by an ordinary action at law because it provided for such an action against directors under Section 3 of this very act (25 G. A. Ch. 29).

The original act of the 25th General Assembly of Iowa and as codified is almost a copy of the provision of the National Banking Act relative to assessments upon stockholders to make good impaired capital.

The Supreme Court of Georgia has held that the provision of the National Banking Act contemplates and allows a sale of shares to make good impaired capital only when the sale brings the amount necessary to make good the impairment. *Merchants Nat. Bank of Rome v. Fouche*, 103 Ga. 851, 31 S. E. 87.

The construction of the National Banking Act made by the Supreme Court of Georgia is in accordance with reason

and policy. Likewise it is in accordance with the plain language of the act.

We have found no case holding that a statute providing for assessment upon stockholders to make good impaired capital and providing for sale of the stock to make good the impairment gives rise to a personal liability. The cases of *Hulitt v. Bell*, (C. C.) 85 Fed. Rep. 98 and *Merchants National Bank of Rome v. Fouche*, 103 Ga. 851, 31 S. E. 87 are direct authority that no personal liability was imposed by the National Banking Act which was, in substance and language, the same as the Iowa statute prior to 1925.

The Supreme Court of North Carolina has held, under the statute of that state providing for sale of the stock on assessment to restore impaired capital, no personal liability is imposed. *Elon Banking and Trust Co. v. Burke*, 189 N. C. 69, 126 S. E. 163.

DIVISION TWO.

Appellee, in argument, relies upon cases involving the right of the state, under reserved power to alter or repeal the franchise, to change the liability of stockholders for corporate debts. On this question we cited authority in our Brief showing the distinction between liability for corporate debts and assessments to make good impaired capital. A full discussion of reserve power as applicable to the corporate privilege of immunity from corporate debts and its non-applicability to assessments to restore impaired capital is found in *Garey v. St. Joe Mining Company*, 32 Utah, 497, 91 Pac. 269. This case contains an elaborate discussion of the question of reserve power and nothing can be added by way of argument to what is there said.

Appellee cites *Gardner v. Hope Ins. Co.*, 9 R. I. 194. We believe the case is unsound. It is expressly disapproved in the case of *Garey v. St. Joe Mining Co., supra.* However,

the case of *Gardner v. Hope Ins. Co.* does not involve any question of enforcing a personal liability to restore impaired capital after a sale of the stock. The case merely holds that under reserved power the legislature could render the stock assessable and subject it to sale. While we believe the case is a result of a misunderstanding of the nature and purpose of reserved power laws, yet, it is no authority for the validity of a statute which goes further than merely appropriating the stock. The Iowa statute involved in this case reaches out and, as applied by the Iowa Supreme Court, compels a stockholder to invest more capital. It goes further and compels him to make a payment to the capital stock after he is no longer a stockholder.

If it could be said that non-assessable stock can be made assessable under the reserved power to regulate, yet such holding is not authority for the decision of this case. The Minnesota Supreme Court in *Yoncalla State Bank v. Gemmill*, 134 Minn., 334, said, referring to the case of *Noble State Bank v. Haskell*, 219 U. S. 104:

> "But it is one thing to impose burdens upon the property voluntarily placed in a banking business, and quite another to impose a personal liability upon him, thereby subjecting property which he has not devoted to banking business to be taken from him to pay creditors of the bank * * *".

Appellee's argument fails to distinguish between an assessment to restore impaired capital and the liability of stock holders for corporate debts. The one is not the equivalent of the other.

CONCLUSION.

Section 9248-a1 Code of Iowa, 1927, is not a provision merely giving an appropriate remedy for an existing right. It is the creation of a new right and also a provision for the

enforcement of such new right. It adds a new burden upon appellant as a stockholder in the bank, impairs the obligation of contract, and takes the property of appellant without due process of law.

Respectfully submitted,

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APPENDIX.

CODE OF IOWA, 1873.

Sec. 1572. If such auditor is satisfied from said examination or reports that any such institution is insolvent, he shall direct the attorney general to commence the proper proceedings, to have a receiver appointed and said institution wound up, and the assets thereof ratably distributed among the creditors thereof, giving preference in payment to depositors.

CODE OF IOWA, 1897.

Sec. 1877. Proceedings against by state—receivers. When it shall appear to the auditor of state that any savings or state bank has refused to pay its deposits in accordance with the terms on which such deposits were received, or has become insolvent, or that its capital has become impaired, or has violated the law, or is conducting its business in an unsafe manner, he shall, by an order addressed to such bank, direct a discontinuance of such illegal or unsafe practices, and require conformity with the law. The auditor of state may appoint an examiner to investigate the affairs of any savings or state bank, who shall have power to administer oaths to any person whose testimony may be required on such examination, and to compel his attendance for the purpose thereof, by subpoena or attachment, in the manner now authorized in respect to witnesses in the courts of the state, and all books and papers which it may be found necessary to inspect on the examination so ordered shall be produced, and their production may be compelled in like manner; all expenses thereof shall be paid by the banks examined, in such amount as the auditor of state shall certify to be just and reasonable, but costs taxed as such shall not exceed

those allowed for like services in the district court. If any such bank shall fail or refuse to comply with the demands made by the auditor of state, or if the auditor of state shall become satisfied is in an insolvent or unsafe condition, or that the interests of creditors require the closing of any such bank, he may authorize a bank examiner appointed by him to take possession of any such bank, whereupon the right of levy, of execution, or attachment against such bank or its assets shall be suspended, and the auditor of state may, with the assent of the attorney-general, apply to the district court or a judge thereof for the appointment of a receiver for such bank, and its affairs shall be wound up under the direction of the court, and the assets thereof ratably distributed among the creditors thereof, giving preference in payment to depositors. The auditor of state, with the assent of the attorney-general, shall have authority to apply for the appointment of receivers of savings and state banks, who shall be residents of the county where the bank is located; and no general assignment for the benefit of creditors shall be of any validity. (15 G. A. ch. 60, Sec. 25; C. '73, Sec. 1572.)

CODE OF IOWA, 1924.

Sec. 9238. Liquidation—right of levy suspended. If any such bank shall fail or refuse to comply with the demands made by the said superintendent, or if said superintendent shall become satisfied that any such bank is in an insolvent or unsafe condition, or that the interests of creditors require the closing of any such bank, he may appoint an additional bank examiner to assist him in the duty of liquidation and distribution, whereupon the right of levy, or execution, or attachment against said bank or its assets shall be suspended. (C., '73 Sec. 1572; C., '97, Sec. 1877; 40 G. A., ch. 189, Sec. 1.)